LIBRARY
SUPREME COURT. U. S.

No. 491

Office-Supreme Court, U.S.
FILED
SEP 9 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

UTILITY USERS LEAGUE and NICHOLAS L. BARNES,
Petitioners,

vs.

FEDERAL POWER COMMISSION,
Respondent,

COMMONWEALTH EDISON COMPANY,
Intervenor-Respondent.

On Petition to Review orders of the Federal Power Commission

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

HARRY R. BOOTH
30 North LaSalle Street
Chicago, Illinois
Attorney for Petitioners

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Statement of Grounds Upon Which This Court's Jurisdiction Is Invoked	1
Statutes Involved	5
Questions Presented	5
Statement of The Case	7
Argument Supporting Reasons Relied on For Allowance of Petition	10
I. Petitioners Were Aggrieved Parties As Consumers And As Representatives of The Public Interest.	10
II. The Merger Was Contrary To The Federal Power Act And Related Statutes And Presents Vital Unsolved Federal Questions.	11
A. General Statement.	11
B. The Purchase Price Was So Excessive As to Violate the Federal Power and Holding Company Statutes and Place an Undue Burden Upon Edison's and Central's Customers.	13
C. This Court Should Decide the Relationship Between Anti-Trust Laws and Federal Power Act	16
D. Other Important Factors Require the Granting of This Petition.	19
III. The Denial of the Motion to Remand Was Error.	22
Conclusion	22
Appendix	23

PAGE

AUTHORITIES CITED

Abbott Lab. v. Gardner, 387 U.S. 136, 140, 141 10

Associated Indus. v. Ickes, 134 F 2d 694, 704 (2d Cir.) 11

AT&T Co. v. U. S., 299 U.S. 232, 246 15

Booth v. General Dynamics Corp., 264 F. Supp. 465 Dt. Ct. No. Dt. Ill. (1967) 11

Brown Shoe Co. v. U. S. 18

Burlington Trunk Lines v. U. S. 22

Calif. v. FPC, 369 U.S. 482, 485 18

Calif. Or. Power Co. v. U. S., 150 F 2d 25, 27 (CA 9) 15

Denver and Rio Grande RR, et al., v. U. S., 387 U.S. 485 12

Duke Power Co. v. FPC #20578 Ca. D. of C. June 28, 1968 7

FCC v. Sanders Radio Station, 309 U.S. 470 11

FPC v. East. Ohio Gas Co., 338 U.S. 464, 475 15

FPC v. Sou. Cal. Ed. Co., 376 U.S. 205 16

FTC v. Proctor & Gamble Co., 18 Law Ed. 2d 303, 311 .. 21

Flast v. Cohen, 20 Law Ed. 2d 947 11

Gilbertville Truck Co. v. U.S., 371 U.S. 115,127,128 20

Hardin v. Kentucky Utilities Co., 390 U.S. 1, 7 11

Jersey Cen. Pr. & Lt. Co., 319 U.S. 61 16

McLean Trucking Co. v. U. S., 321 U.S. 67, 86, 88 20

PAGE

Michigan Cons. Gas Co. v. FPC, 283 F 2d 204, 226 (CA) Dt. Col. 1960 22

Pac. Pr. & Lt. Co. v. FPC, 111 F 2d 1014, 1017 ..... 4, 18

Pa. Water & Pr. Co. v. U. S., 343 U.S. 414, 418 .... 11, 13

Scenic Hud. Pres. Conf. v. FPC, 354 F 2d 608, 620 (CA 2d 1965) 10, 22

Schwabacher v. U. S., 334 U.S. 182, 193 20

SEC v. New Eng. El. System, 384 U.S. 178 12

U. S. v. Chicago M. St. P. & P. RR, 294 U.S. 499, 510 12

U. S. v. El Paso Nat. Gas Co., 376 U.S. 651, 658 18

U. S. v. First City Nat. Bk., 18 Law Ed 2d 151, 156, 157 18

Udall v. FPC, 387 U.S. 428, 437-451 22

United Church et al. v. FCC et al., 359 F 2d 994, 998-1006 (1966-CA D of C) 11, 22

STATUTES AND OTHER AUTHORITIES

16 U.S.C., 825 e(g) 1

16 U.S.C., 824 b (Sec. 203a) 2, 4, 5, 6, 7

16 U.S.C., 825 1 (b) 10

15 U.S.C. 79ff (Public Utility Holding Co. Act of 1935) 4, 5, 6, 15

15 U.S.C. Secs. 2, 18 16-19

28 U.S.C 1254 (1) 1

AT&T Opinion FCC #16528 July 5, 1967 18

Bonbright Valuation of Property Vol. II (1937) McGraw Hill 1937 14

PAGE

Chairman White Statement, Senate Committee on Commerce 90th Cong. (p. 28) S.B. 1834 June 1967 .. 12, 13

National Power Survey (Vol. II FPC (p. 366-368)) 18

Statistics El. Utilities, FPC 1965 ..... 3, 9

INDEX TO CERTIFIED COURT OF APPEALS RECORD

Opinion of Court of Appeals .....April 5, 1968

Judgment Order .....April 5, 1968

Petition for Rehearing Denied .....May 21, 1968

Order en Banc Denying Petition for Rehearing .....May 28, 1968

Petitioners' Appendix

(58 Pages including FPC Order of Dec. 2, 1966) .....Filed Nov. 8, 1967

Joint Appendix—FPC and Edison (165 Pages) .....Filed January 29, 1968

Petitioner's Motion to Remand (22 Pages including Exhibits) .....Filed Feb. 13, 1968

In the
Supreme Court of the United States

OCTOBER TERM, 1968

NO.

UTILITY USERS LEAGUE and NICHOLAS L. BARNES,
Petitioners,

vs.

FEDERAL POWER COMMISSION,
Respondent,

COMMONWEALTH EDISON COMPANY,
Intervenor-Respondent.

On Petition to Review orders of the Federal Power Commission

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NOW COMES UTILITY USERS LEAGUE, *et al.*, Petitioners herein, respectfully prays that a writ of certiorari issue to review the final judgment of the Court of Appeals for the Seventh Circuit in this Cause.

OPINIONS BELOW

The decision of the Court of Appeals has been reported in 394 F. 2d 16. The FPC order entered on December 2, 1966 is at 36 FPC 927.

JURISDICTION

The judgment was issued on April 5, 1968. On May 21, 1968 it denied Petitioners' Petition for rehearing and on May 28, 1968 a similar Order was filed by the Court en banc. An extension was granted Petitioners by Justice Thurgood Marshall until September 10, 1968 to file this Petition. Such jurisdiction is founded upon 16 U.S.C. 825 1(b) and 28 U.S.C. 1254(1).

STATEMENT OF GROUNDS UPON WHICH THIS COURT'S JURISDICTION IS INVOKED

The jurisdiction of this Court is invoked upon the following primary grounds:

1. The ruling of the Court denying Petitioners' standing to review the FPC Merger order is contrary to decisions of this Court and other Courts of Appeal.

2. Though the basic issue involves the FPC's duty to preserve sound, efficient small operating companies providing electric service to the mass of residential customers at lower rates than giant systems such as Commonwealth Edison Company (Edison), it also presents the interpretation of the merger provisions of the Federal Power Act (FP Act) 16 U.S.C. 824 b Sec. 203, in relationship to the overall object of such statute, the Public Utility Holding Company Act (HC Act) and the anti-trust laws and policies.

3. Since the FPC approved the merger primarily because of power supply factors and assumed "economies of scale" in relation thereto, this Court should decide whether FPC has unlimited discretion to disregard the fundamental voluntary intereonnection, coordination and

power supply purposes of the FP Act, in favor of compulsory merger, even though Central Illinois and Electric Gas Company (Central) had available substantially the same supplementary supplies of electric power from Edison at its average generating costs. (FPO p. 13) (36 FPC 936).[1]

4. Apparently no other Courts since the passage of the FP Act has decided this basic issue, though between 1951-1965, FPC approved 108 Class A electric company mergers (FPO p. 3).. The number of such companies in the country diminished to only 215 as of December 31, 1965.[2] The FPC has only recently revealed a concern over the increasing trend of acquisition of smaller municipal and privately-owned plants.

5. This Court for the first time can determine the special relationship between anti-trust laws and policies to mergers under the FPA. It has consistently fulfilled such vital function with respect to other regulated industries.

6. The settlement of this important federal question is also necessary in view of the rulings of the Court and FPC. The Court affirmed the FPC merger order on the theory, in part, that restraints on competition in the electric industry were encouraged even though it could not say the merger "has no adverse effect on competition" and asserted "We merely hold that petitioners have not shown an anti-competitive injury affecting them." (394 F. 2nd 20). (Protection from competitor and this merger are not the same)

---

[1] The FPO page numbers refer to the original FPC merger order of December 2, 1966. The 36 references are to the GPO Preliminary Print 36 FPC (927-946).

[2] Statistics of El. Utilities in the U.S. 1965, Classes A and B Privately Owned, FPC p. V Preface. Class A have annual revenues of over $2,500,000, Class B $1,000,000 to $2,500,000.

7. FPC's application of the anti-competitive issue was erroneous for several reasons including the fact that it considered relevant only whether the merger would "bring a significant added concentration of economic power." (FPO 23) (36 FPC 941). *This theory would eliminate restraints on mergers.*

8. The nature of the burden of proof to be applied is a judicial question, particularly whether a presumption against a merger may not be assumed against so large a company as Edison. This is aside from the injury to the public recognized by the Court that Petitioners had shown the merger "may result in higher rates for Central's electric customers." (394 F. 2nd 20).

9. Since the FP Act is silent as to FPC's responsibility under anti-trust laws and contains no provision exempting electric utilities from such laws, Congress intended this Court should review and reach an independent judgment upon FPC's application of anti-competitive factors.

10. It presents substantial issues affecting the objects of the FP Act and HC Act in relation to the alleged overcapitalization, excessive price paid for Central and substitution of a non-integrated electric and gas company for an integrated electric company (Edison) prior to the merger.

11. The FPC interpreted the key proviso in 16 USC 824 b that a " 'showing that positive benefit to the public will result' " is not required under *Pacific Power and Lt. Co.* v. *FPC,* 111 F. 2d 1014, 1017 (CA 9, 1940) (FPO p. 4, 36 FPC 931), without giving effect to its ruling mergers should not result "in detriment to consumers or investors or other legitimate national interests." (p. 1016)

12. The Court's denial of Petitioners' Motion to Remand is contrary to well recognized principles for the FPC failed in its duty of making an independent study of and developing an adequate record upon several controlling factors including (a) the need for preserving small companies, (b) the so-called "economies of scale" as related to Edison and Central's overall costs, (c) anti-trust issues, (d) whether Edison has discriminated against its 2,000,000 residential users and granted preferential treatment to its less than 600 large industrial customers so that it may compete unfairly for such business with other electric companies and pursue the same practice in favor of a few customers using electricity for house heating as well as apartments and office buildings; (e) the effect upon air pollution in the City of Chicago of relieving Central of building its own generating facilities. (Motion p. 4-16 and Exhibits).

13. It also presents basic issues of the interrelationship between state and federal authorities requiring resolution by this Court.

STATUTES INVOLVED

The Statutes involved are the Federal Power Act as a whole Sub-Chapter II, Regulation of Electric Utility Companies Engaged in Interstate Commerce, 16 U.S.C. 824-825u and more particularly Secs. 203, 202, 206, 16 U.S.C. 824, 824a, 824b, 824 1. It also involves 15 USC 79 ff Public Utility Holding Company Act of 1935 and Secs. 7 of the Clayton Act. 15 U.S.C. Sec. 18; 15 USC Sec. 2.

QUESTIONS PRESENTED

1. Did Petitioners have standing under 16 U.S.C. 8241 as an aggrieved party to seek review of the FPC orders and may they assert any alleged errors affecting the public interest.

2. Does Sec. 16 U.S.C. 824, Sec. 203a permit approval of a merger as consistent with the public interest even in the absence of positive benefit and how should this standard be applied.

3. Does the order of December 2, 1966, contravene Sec. 203a and the Federal Power Act as a whole for the reason among others that the purchase price was excessive.

4. Did Edison and Central fail to sustain the burden of proof imposed upon them.

5. Does the Order violate the Public Utility Holding Company Act Section 11 (b) (1) in that it converts Edison from an integrated electric company into a utility operating non-integrated gas and electric properties.

6. Are the FPC Orders of December 2, 1966 and January 30, 1967 arbitrary and illegal in that they violate anti-trust laws and policies.

7. Did the FPC fail in its duty to develop an adequate record upon the controlling issues.

8. Did it err in failing to reopen the case as requested by Petitioner.

9. Did the Court of Appeals err in failing to grant the League's Motion to Remand.

10. Did the Court of Appeals err in affirming the FPC Orders.

11. Was the order contrary to the evidence.

STATEMENT OF THE CASE

The record contains the FPC Order, the Opinion of the Court of Appeals and Petitioner's Motion to Remand denied by the Court of Appeals. (394 F.2d 16, 21). These documents, with the additional facts referred to in this Petition, provide an adequate basis material to the consideration of the questions presented. It would unduly lengthen this Petition to duplicate such factual material. Though we accept the FPC's statements of fact, we generally disagree with their conclusions. Moreover, as this Petition indicates, FPC overlooked a number of critical facts.

The purpose of the Motion to Remand is to show the material facts omitted from the record and to provide substantial support for our claim it is the smaller companies like Central rather than the giant systems like Edison which provide in general the lowest residential rates in the country. It also serves to back up our contention the FPC staff concentrated entirely too much on power supply problems and should have devoted more attention to the comparative efficiency and costs of service incurred by smaller as compared with larger electric companies.

Though FPC possesses one of the most competent research staffs of all regulatory agencies and constantly publishes valuable economic, rate and statistical studies, little if any is in this record.

Edison and Central presented their application under Sec. 203(a). Edison's interstate operations are substantial and Central conceded jurisdiction. None of the problems presented in *Duke Power Co.* v. *FPC*, No. 20,578, CAD of C June 28, 1968, are considered applicable here. This

searching extensive opinion, demonstrates the need for close scrutiny on the merits of the present merger. The points below illustrate shortcomings in the Record.

1. The FPC Order granting petitioner's intervention was entered on July 3, 1968. The interval was too short to prepare for the hearings scheduled for July 11 and closed on July 20 even though much of Edison's affirmative case was made available to Petitioner earlier. Since Central and its predecessors were first organized in 1855, we think a 30 day postponement for rebuttal and the scheduling of the hearing in Chicago were essential ingredients of a fair hearing.

2. Some facts about Edison and Central have obviously been overlooked in the FPC Order. Though it serves an area of 11,000 square miles, or about 20% of Illinois, the heart of the Chicago Metropolitan area, including large suburbs, and the northern part of the state, its revenues represent over 60% of all Illinois electric revenues.

3. Central's total territory was about 3,200 square miles and served about 95,000 electric customers. Edison had ver 2,200,000 customers in its 11,000 square miles. Central's density of customers per square mile was about 30 compared to Edison's 200. Yet the FPC attempted to explain Central "favorable profit picture and rates comparable to Edison" (p. 20) (36 FPC 939) because Central had a higher density in Rockford. Central had much lower residential rates than Edison's.

4. The order considers as a favorable factor toward Edison its total rate reductions of $31,000,000 since 1962 and that Central has not reduced its rates "at the same pace" as Edison (FPO 20, 36 FPC 939). However the order

ignored Edison's admission its rate reductions had not offset the much larger rate increases made by Edison during the last 10 year period. Nor was any calculation made as to the savings to Edison's customers if the $.75 monthly rate charged by Central to most of its residential customers was substituted for Edison's minimum monthly charge of $1.00 in Chicago and $1.50 in its suburban territory. No explanation was given for FPC's failure to put into the record the numerous national and Illinois rate studies made by its staff. Petitioner's Motion to Remand exhibits A, B, and C disclosed, unfavorable position compared to Central and over 30 of the 40 electric companies in the country whose annual revenues exceeded $100,000,000 in 1965.

Moreover at best, FPC's conclusion concedes Central could have achieved the so-called "savings of scale" had it not "essentially isolated" itself (FPO p. 29) (36 FPC 944). A company which could serve 80% of its residential customers at rates lower than Edison, increase its business at a little higher rate and still make a somewhat higher rate of profit than Edison (1965 Statistics Electric Utilities FPC pp. 652, 653) is hardly the proper subject of compulsory consolidation.

Surely, these and other similar facts in the Motion to Remand rebut Edison's and FPC's reliance upon "economies of scale" as a controling factor.

ARGUMENT SUPPORTING REASONS RELIED ON FOR THE ALLOWANCE OF PETITION

I. PETITIONERS WERE AGGRIEVED PARTIES AS CONSUMERS AND AS REPRESENTATIVES OF THE PUBLIC INTEREST.

The Court, Judge Swygert dissenting, sustained Edison's contention Petitioners lacked standing as an "aggrieved" party under 16 U.S.C. 825 1 (b) for it held they failed to "make the threshold showing of aggrievement" (pg. 7) (394 F. 2nd 21) FPC did not join in this claim. The Court's errors are recognized in the minority opinion. Judge Swygert properly relied upon Petitioners exercise of their right to file a petition for rehearing (FPC rec. 1943-1956) (without Edison's objection)[3] founded upon 16 U.S.C. 8251 (a) limiting such privilege to "any person . . . aggrieved by an order of the commission." The identical phrase governes judicial review of FPC's order under 16 U.S.C. 8251 (b).

This point was considered and decided contrary to Edison's claim in *Scenic Hudson* v. *FPC*, 354 F. 2nd, 608, 616 (CA 2, 1966). The majority also overlooked *Abbott Lab.* v. *Gardner*, 387 U.S. 135, 140, 141 reaffirming the principle against restrictions of judicial review which are not to "be cut off unless there is a persuasive reason to believe that such was the purpose of Congress."

The Court would destroy effective intervention by consumers before administrative agencies and nullify their capacity to act as a private Attorney General approved

[3] Edison filed no Motion to Dismiss Petitioners' Petition for Review.

in a growing number of cases since *Asso. Indus.* v. *Ickes*, 134 F. 2d 694, 704 (2d Cir.), *United Church et al.* v. *FCC et al.*, 359 F. 2d 994, 998-1006 (1966—CA D of C), see also *FCC* v. *Sanders Radio Station*, 309 U.S. 470, and *Flast* v. *Cohen*, 20 Law Ed. 2d 947 and dissent of Justice Harlan at 973 and *Booth* v. *General Dynamics Corp.*, 264 F. Supp. 465 Dt. Ct. No. Dt. Ill. (1967) for expanded recognition of tax payers, consumers and others.

The major thrust of Petitioner's FPC Petition for Intervention (Rec. 1551-1562) was devoted to a demonstration intervention was necessary to protect the public interest as the merger was contrary to the broad purposes of the FP Act, HC Act and Anti-trust Statutes.

Though we do not stand in the same shoes as Kentucky Utilities in *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 7 we do, as there, come within the class the FP Act is "designed to protect" under *Pennsylvania Water & Power Co. et al.* v. *FPC*, 343 U.S. 414, 418 for this Court then said "a major purpose of the whole Act is to protect consumers against excessive prices."

It would be repetitious to take up each of the Court's erroneous conclusions at this time for they will insofar as possible be met in the balance of the Argument.

II. THE MERGER WAS CONTRARY TO THE FEDERAL POWER ACT AND RELATED STATUTES AND PRESENTS VITAL UNSOLVED FEDERAL QUESTIONS AS TO JUSTIFY GRANTING OF THE PETITION.

A. General Statement.

Petitioners cannot, within a brief Petition, cover each of the errors committed by the FPC but will discuss only

those of greatest consequence.[4] The merger as a whole in relation to the relevant federal laws, can be judged by the demand (contrary to *SEC* v. *New Eng. System,* 384 U.S. 178) Edison be transformed from an integrated electric company to one operating scattered electric and gas properties throughout Illinois. Other basic aspects of the merger were equally in conflict with federal regulatory statutes and policies. The reservation of FPC authority to require Edison to subsequently dispose of such properties did not eliminate the basic conflicts between the merger and federal laws. This reservation does not conform to *Denver and Rio Grande RR, et al.* v. *U. S.,* 387 U.S. 485 and *U. S.* v. *Chicago M. St. P. & P. RR,* 294 U.S. 499, 510, when this Court said: "We have stressed the unsatisfactory consequences which often occur when agencies defer action and leave parties uncertain as to their rights and obligations."

The FPC and Court rulings may be tested by considering the following statement by FPC Chairman White before the Committee on Commerce in June 1967 when he said: (Hearings before the Committee on Commerce U.S. Ninetieth Congress 1. 1365, p. 28.)

> "The three principal areas in which Congress believed *Federal jurisdiction was essential to assure effective regulation of electric utilities were*: first, wholesale sales in interstate commerce; second, the financial operations and books of account; and third, interconnection and coordination of public utilities. Congress directed the Commission to encourage voluntary interconnection and coordination, supplemented by compulsory authority, to enable the Commission, upon application, to order jurisdictional public utilities to interconnect their facilities with other electric utilities and sell or exchange energy with them." (p. 28)

---

[4] The FPC order reprinted in 36 FPC 927-946 lists 23 points in the syllabus. We disagree with the conclusions or application of at least one-half of them.

Though this Court in *Pa. Water and Power Co.* v. *FPC*, 343 US 414, 418 was dealing with FPC's control over interstate wholesale rates, FPC listed as relevant factors the impact of the merger upon consumers rates and effectiveness of state and federal regulation. This Court's statement in the above case is of equal significance in testing whether the merger conforms to the FP Act.

> "A major purpose of the whole Act is to protect consumers against excessive prices."

Edison conceded its retail rates do not measure up to FPC's rate making standards (Rec. 448). We will demonstrate the merger likewise is basically inconsistent with the Congressional purposes of the Federal utility laws.

B. The Purchase Price Was So Excessive As to Violate The Federal Power and Holding Company Statutes and Place an Undue Burden Upon Edison's and Central's Customers.

In his June 1967 statement to the Commerce Committee Chairman White listed "financial operations" as one of the three principal areas Congress believed Federal jurisdiction essential to assure effective regulation. Control over accounting was but one aspect of financial practices regulated to safeguard the public interest. Emphasizing the importance of the protection afforded the public by FPC activities in this field he said FPC had eliminated more than $1,600,000,000 of water from public utilities plant accounts. Unfortunately FPC failed to recognize Edison's financial proposals were merely a subterfuge to conceal the same practices under a different name.

The "reasonableness of the purchase price" (p. 7) was properly declared by the FPC to be one of the five basic

factors in determining whether "this particular merger is consistent with the public interest". Strangely the order devotes only a single paragaph to this vital issue (FPC p. 15, 16) (36 FPC 937) and also omits the purchase price.

It says Edison was paying "approximately $24 million more than the market value (of Central's stock) for the acquisition." (p. 15) Petitioners repeatedly challenged the excessive character of the price which can be calculated by applying the following principle:

> "To be sure, if the stock that is issued for the property has a definite market value at the time of the exchange, this value may be deemed to be the purchase price of the asset." Bonbright Valuation of Property, Vol. II, 1937, McGraw Hill. (p. 927)

As of the date of the merger contract the market value of Edison's securities was approximately $127,000,000. In addition it assumed approximately $50,000,000 of fixed liabilities. The total price was thus in the area of $175-$180,000,000.

The net investment of Central's property as of December 31, 1965, was $91,681,655 ($56,422,122 electric, $33,761,799 gas), (FPC 8) (36 FPC 933). Thus the ratio of net original cost to the price was 2 to 1. During the hearing the Examiner restated one of the Leagues questions to Central's President, John L. Gordon, as follows (Rec. 835):

> "Presiding Examiner: Take the price as of the day of the merger was announced, as of the day the company publicly committed itself to merger. Were you on that day getting for your shareholders 75 million dollars over and above the net assets being transferred?
>
> The Witness: I think so."

On June 10, 1968, the FPC in Columbus & So. Ohio Elec. No. 7390, though approving the sale of a small system, directed its staff to inquire into the relative efficiency of small and large electric plants. This is one of the critical issues upon which the FPC record was incomplete and was raised in Petitioner's Motion to Remand (p. 5-11). However, in his dissent, Commissioner Charles Ross related the price paid in several cases to the original cost of property acquired. These prices varied from $341 to $1093 per customer. However, though Central's net investment ($56,000,000) in electric plant per electric customer (95,000 in all) was $600 in 1965, Edison is apparently paying 60% of $175,000,000) nearly double that figure, or $1,100, for each Central electric customer. Edison's own investment in all its electric properties ($1,788,000,000) prior to the merger and including its enormous generating plants was but about $800 per customer (2,272,000 in all). Edison paid about $800 per Central gas customer compared to Central's net investment of about $400.

It is common knowledge that it was the application of fair value, reproduction cost and inflated appraisals which led to the bankruptcy of numerous utility holding company systems and passage of the HC Act in 1935. Section 79 (b) (1) 15 U.S.C. Necessity for Control of Holding Companies states:

> " . . . When such securities are issued upon the basis of fictitious and unsound asset values. . . "

The FPC Order is not in accordance with its own or the rigorous financial standards approved by the federal courts in utility cases. *FPC* v. *East Ohio Gas Co.*, 338 US 464, 475, *Calif. Ore. Power Co.* v. *FPC*, 150 F. 2d 25, 27 (CA 9th). See also *AT&T* v. *US*, 299 US 232, 246. Moreover, the FP Act has been liberally construed to assure maximum protection of the public interest by the FPC. *Jersey*

Central Power and Lt. Co. v. *FPC*, 319 US 61; *FPC* v. *So. Cal. Ed. Co.*, 376 US 205.

Both the FPC and the Court overlooked the burden imposed upon both Central's and Edison's customers by the price paid by Edison for Central's property. As far as the customers are concerned, the impact upon them by the excessive issue of Edison securities would be exactly the same as if Edison had increased its original cost by $75,000,000. It is the customers, and the customers alone, who support the entire capitalization of a utility and the rates must be high enough to pay operating expenses, interest dividends and as the record of Edison, Central and other utilities reveal, substantial annual additional sums for surplus. The Court was completely in error in assuming Edison's customers are protected from the adverse effect of the excessive price and over-capitalization because their rates are fixed on fair return on a fair value of Edison's property (394 F. 2d 20, 21). The reverse is true.

The issue whether Edison was permitted to evade the underlying purposes of the FP and HC Acts is a judicial question within the province of this Court.

C. This Court Should Decide The Relationship Between Anti-Trust Laws to the Federal Power Act.

Since this Court has consistently assumed the responsibility of passing upon the application of antitrust to other regulated businesses it is appropriate that it do so here involving as it does the largest. The fact that the FP Act is silent on anti-trust, and the FPC has since 1935, administered the statute does not mean that this Court should not now offer appropriate guidance to the FPC in the light of the rapidly changing technology and operating problems.

Moreover, this case involves the classic instance of a giant and a smaller neighbor, Central, which by no means was failing, inefficient or weak. On the contrary, it provided service to the bulk of its customers at lower rates than Edison and yet seemed to make a higher return on net investment. It presents the all-important problem of preserving smaller electric companies whose public need is considerably more than theoretical. In the absence of public competition and anything more than nominal rate control of Edison's $2,000,000,000 system, retention of smaller companies should assure at least the possibility of supplementary protection to the customer, depending in turn upon their independence and the capacity of states to regulate them.

This is particularly necessary where increases in size escalate ineffectiveness of control, especially since rates are fixed, if at all, only on the overall system as demanded by Edison. Moreover, its successful advocacy of fair value has probably dealt the final death blow to rate control. How can a former customer of Central (or even Rockford, Chicago or the State) establish that Edison as a system is producing more than a fair return on fair value. Local rate regulation of Edison thus becomes fiction.

This Petition is not the occasion for attempting to set forth the exact principles which should govern the relationship of the electric utility industry to the nation's anti-trust laws and policies. The FPC Order has undoubtedly made a contribution to the subject even though we quarrel with its conclusions. It was handicapped by the limited record bearing upon anti-competitive issues due, in part, to the fact that the original order listing the issues upon which testimony was to be taken contained no reference to anti-trust (Rec. 159). Moreover, it was persuaded by Edison that the hearing should be shortened and the examiner's report omitted. It did not require Edison to

sustain the burden of proof on this issue *U. S.* v. *First City Nat'l Bk.*, 18 Law. ed. 2d 151, 155, 156; *Pac. Power & Light* v. *FPC*, 111 F. 2d 1014, 1017.

The application of *Calif.* v. *FPC*, 369 U.S. 482 to electric utilities subject to FPC's jurisdiction under the FPC Act was upheld by Lee Loevinger, Ass't. Attorney General of the Antitrust Division of June 7, 1963 (pages 366-368), Part II National Power Survey in a letter to the head of the Committee's Legal Advisory Committee, Herbert B. Cohn. In this opinion he recognized the absence of a comprehensive federal statute regulating the rates, entry terms and conditions of service and other elements of the operations of these companies, This would imply support for Petitioners' claim the FPC Order and the Court's opinion in so far as they relied upon state regulation as the basis for exemption from anti-trust principles were in error, let alone that they overlooked they were banking on the fiction and not the reality of state control of so large a system as Edison.[1]

In declaring that it was concerned only with the added concentration of power arising from Edison's acquistion of Central it ignored the trend of concentration in the electric power industry even though this Court asserted in *Brown Shoe Co.* v. *U. S.*, 370 U.S. 294, "the rising tide of economic concentration" (p. 317) and "another important factor is the trend toward concentration in the industry." (p. 332). The principles underlying the *Brown Shoe* case were applied by the Court to utilities regulated by the FPC in *U. S.* v. *El Paso Nat. Gas Co.*, 376 U.S. 651, 658, where the Court quoting from *Brown* declared "mergers with a probable anti-competitive effect were to be prescribed by this Act." (Sec. 7 of the Clayton Act).

---

[1] See opinion of Commissioner Nicholas Johnson in *AT&T* case, FCC No. 16258, July 5, 1967.

Assume Edison (prior to the merger) controls 65% of the customers, electric plant and revenues in Illinois. Central's merger would bring this to about 70%. Assume also substantial portions of Illinois-Power Company service areas are contigous to Edison and not to the balance of Illinois Power. The contigous area would add only another 3% to Edison's 70% of plant and revenues. This additional acquisition would also not be significant. Even if Illinois-Power or another electric company furnished 10% of the remaining service in Illinois, such 10% would be less of a significant added concentration to Edison's new 70% figure than to its original 65% prior to the merger with Central. The FPC doctrine would readily escalate mergers if literally applied.

It is a function of this Court to pass judgment upon such questionable principles.

The Petition should be allowed.

D. Other Important Factors Require The Granting Of This Petition.

It is impossible to determine the full extent to which the Commission's judgment was colored by its conclusion no showing of positive benefit was required under the provisions of the merger need only be "consistent with the public interest." There is no doubt but that its approval was seriously affected by this principle.

What is consistent with the public interest depends upon the characteristics of the purchaser and the seller, the special and peculiar current operating conditions as they bear upon the FPC overall responsibilities, the legislative history and Congressional intentions in enacting the federal statutes we have discussed. This is indeed what the FPC endeavored to do but, lacking the guide and direction of

the highest Court, it departed from its customary effective standards of public protection.

True, this Court has in its review of Section 5(2)(b) the Interstate Commerce Act, dealt with a similar statutory provision. *Gilbertville Trucking Co.* v. *U. S.*, 371 US 115, 127, 128; *Schwabacher* v. *U. S.*, 334 US 182, 193; *McLean Trucking Co.* v. *U. S.*, 321 US 67, 86-88.

We find no support in them for the view no public benefit is required. In fact, consistency or compatability with the public interest implies substantial public values or benefits.

Nor can the merger be sustained by Central's power requirements. There is no claim in the record of any existing shortage of electric power as far as Central or its customers are concerned. Its present contract with Edison for supplementary modest supplies of electric energy (p. 10) was not only in no danger of termination, but Edison had made "a bonafide offer" (p. 14) of additional supplies on a ten year basis. The Commission declared that the rate for this power seemed to reasonably reflect Edison's "present average generation and transmission costs." (p. 14) However, because it would not "secure the full benefits of the lower costs" associated with the more efficient generating plants now under construction or planned for the future (p. 14) it rejected this method. It completely overlooked the fact that Central's customers would not be entitled to, under the merger, rates based upon only Edison's lowest cost generating and transmission facilities but must be charged with average costs.

The FPC order is hinged primarily upon Edison's "economies of scale" for it said the "touchstone of successful operation in today's electric power industry is the coordination of operating facilities to achieve the full economies of scale made possible by advancing technolo-

gy." (p. 3) This, it asserted, could be achieved in several ways. Though it said the merger was but one of several ways of realizing the advantages of coordination, it rejected without recognizing the proper legal impact of other controlling issues and the alternative methods of coordination which Congress and Chairman White himself said should be utilized.

This Court said in *FTC* v. *Procter & Gamble Co.*, 18 L. ed 2d 303, 311 said, "Possible economies cannot be used as a defense to illegality."

In fact, the FPC itself declared coordination of Central's electric facilities without the merger would have been possible had Central moved more rapidly to such end (FPC 29).

III. THE DENIAL OF THE MOTION TO REMAND WAS ERROR.

It is unnecessary to repeat the summary of Petitioner's constructive Motion to Remand. (*supra* p. 5) It set up adequate grounds under 16 USC 825 l(b) in that it included substantial facts on the most material factor in the case. Such evidence was shown not to have been reasonably available to Petitioner earlier. It was the primary responsibility of the FPC and Edison to have produced the economic and statistical material bearing upon the relative efficiency of Edison and other giant systems compared to Central and the smaller electric companies of the nation. The fact FPC in June, 1968 itself undertook such a study, in part, demonstrates the essential need for such factual material in this record before a proper conclusion could be reached as to whether the merger was consistent with the public interest. It then recognized Petitioners had been correct.

There is ample authority among the decisions of this Court to support Petitioner's contentions, *Udall* v. *FPC*, 387 US 428, 437-451; *Scenic Hudson Preservation Conf.* v. *FPC*, 354 F. 2d 608, 624, 625 (CA 2) (1965); *Michigan Cons. Gas Co.* v. *FPC*, 283 F. 2d 204, 226 (CA Dt. of Col. 1960). In fact this Court has directed a remand even where new significant facts arose any time prior to the entry of the decision in the lower court. *Burlington Truck Lines* v. *U. S.*, 371 U.S. 156, 171. The issue of air pollution comes within this category. (Motion to Remand p. 12)

CONCLUSION

Petitioners have clearly demonstrated a showing justifying its allowance. Adequate discussion of the highly critical issues within the special province of this Court will then only be possible by all the parties.

Respectfully submitted,

UTILITY USERS LEAGUE and
NICHOLAS L. BARNES
Petitioners

By HARRY R. BOOTH
30 North LaSalle Street
Chicago, Illinois
Attorney for Petitioners

APPENDIX

APPENDIX

STATUTES INVOLVED

FEDERAL POWER ACT

Sec. 203 of the Federal Power Act, 16 U.S.C. 824b

(a) No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility without first having secured an order of the Commission authorizing it to do so. Upon application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable. After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same.

(b) The Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate.

Public Utility Holding Company Act —
Section 11, 15 USC Sec. 79k

Sec. 79k. Simplification of holding company systems— Examination by Commission with view to simplification.

. . . (b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: Provided, however, That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that —

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

16 U.S.C.

Sec. 825(1) Rehearings; court review of orders

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order . . .

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business . . .

If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recomendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1967—APRIL SESSION, 1968

No. 16164

UTILITY USERS LEAGUE AND NICKOLAS L. BARNES, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent,*

COMMONWEALTH EDISON COMPANY, *Intervenor.*

On Petition to Review Orders of the Federal Power Commission.

April 5, 1968

Before HASTINGS, *Chief Judge,* and CASTLE and SWYGERT, *Circuit Judges.*

HASTINGS, *Chief Judge.* This is a petition for review of the Respondent Federal Power Commission's order of December 2, 1966 approving the merger of Central Illinois Electric and Gas Company (Central) into Respondent-Intervenor Commonwealth Edison Company (Edison). Petitioners are Utility Users League and Nicholas L. Barnes, an Edison customer. The Utility Users League, according to the allegations in its petition to intervene before the Commission, is "a not-for-profit association of utility users including customers of Commonwealth Edison Company." Edison and Central are public utilities incorporated and operating in Illinois.

Prior to merger Edison provided electric energy for a service area of 11,000 square miles having a population in excess of 7,000,000. It had 2,272,700 customers in its service area, which contained the City of Chicago and its suburbs. The net value of its plant on December 12, 1965 was $1,788,082,518, and its annual operating revenue was $589,315,479. Edison operated twelve steam generating stations having a net capability of 7,764,000 kilowatts.

Central furnished electricity, gas, and minor amounts of water and steam heat in five non-contiguous territories in Illinois. The largest of these territories was the Rockford division, which contained 78% of Central's 94,468 electric customers and 81% of its 87,227 gas customers. That territory was surrounded on three sides by Edison's service area. On December 31, 1965 Central's net utility plant was valued at $91,681,655 (of which $56,422,122 was allocated to electric plant and $33,761,799 was allocated to gas plant) and its annual operating revenue was $40,533,403 (of which $22,951,829 was electric revenue and $17,126,436 was gas revenue). Central's two generating stations had a capability of 239,500 kilowatts. In the five years ending with 1965, Central's electricity sales increased at a compound annual rate of 7.8 percent. Its estimated 1966 peak load was 210,000 kilowatts.

Edison and Central filed a joint application for approval of their plan of merger on March 2, 1966 pursuant to § 203(a) of the Public Power Act, 16 U.S.C.A. § 824b (a). Petitioners filed their petition to intervene on April 7, 1966. Their petition and that of the City of Rockford were granted on July 6, 1966. Hearings were held between July 11 and July 20, 1966. Petitioners did not appear at those hearings, but were permitted to submit written interrogatories. The Commission's order and opinion approving the merger were filed on December 2, 1966. On January 30, 1967, the Commission denied petitioners' petition for rehearing filed January 3, 1967.

In its opinion the Commission considered the reasonableness of the purchase price, the accounting treatment, the economic effect of the merger, its voluntariness and its effect on competition. The Commission concluded that the merger was consistent with the public interest, as

required by 16 U.S.C.A. § 824b(a). It retained jurisdiction for future decision on Edison's operation of Central's gas and non-contiguous electric properties.

In their petition for review petitioners challenge the Commission's order on several grounds. They contend that the Commission failed to give adequate consideration to the anti-competitive effects of the merger, that the applicants failed to make an adequate record, that the merger violates the Public Utility Holding Company Act § 11(b)(1), 15 U.S.C.A. § 79k, that the purchase price was excessive, and, generally, that the merger is not "consistent with the public interest." See, 16 U.S.C.A. § 824b(a).

We are without jurisdiction to entertain this petition unless petitioners are parties "aggrieved by an order issued by the Commission." 16 U.S.C.A. § 825l(b). Similar limitations on the right to obtain judicial review are contained in other federal regulatory statutes. See, *e.g.*, Natural Gas Act, 15 U.S.C.A. § 717r(b); Communications Act, 47 U.S.C.A. § 402(b)(6).

The term "aggrieved party" has long eluded precise definition, and, as the Supreme Court has noted, its meaning "is in any event more or less determined by the specific circumstances of individual situations." *Chapman* v. *Federal Power Commission,* 345 U.S. 153, 156 (1953). Clearly, a petitioner for review need not show injury to a personal economic interest. *Scenic Hudson Preservation Conference* v. *Federal Power Commission,* 2 Cir., 354 F. 2d 608, 615 (1965).

A party seeking judicial review cannot rest on the mere allegation that he is "aggrieved." He must make a preliminary showing of aggrievement. *Lynchburg Gas Company* v. *Federal Power Commission,* 3 Cir., 284 F. 2d 756 (1960); *Cincinnati Gas & Electric Co.* v. *Federal Power Commission,* D.C. Cir., 246 F. 2d 688 (1957); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 3 Cir., 219 F. 2d 729, cert. denied, 349 U.S. 945, reh. denied, 350 U.S. 868 (1955).

In determining petitioners' standing to seek review in this court we are not bound by the Commission's order granting petitioners leave to intervene in the pro-

ceeding before the Commission. Petitioners' standing is a jurisdictional question to be determined by this court. In any event, the Commission's order permitting intervention provided that "the admission of such petitioners shall not be construed as recognition by the Commission that they, or any of them, might be aggrieved because of any order or orders issued by the Commission in this proceeding."

Petitioners alleged before the Commission that some of them were customers of Edison. Consumers have been found to be "aggrieved persons," entitled to obtain judicial review. *City of Pittsburgh* v. *Federal Power Commission,* D.C. Cir., 237 F. 2d 741, 748-749 (1956); *Reade* v. *Ewing,* 2 Cir., 205 F. 2d 630, 631-632 (1953); *Associated Industries* v. *Ickes,* 2 Cir., 134 F. 2d 694, 705-713, vacated for mootness, 320 U.S. 707 (1943). In each of these cases, however, the petitioner made substantial factual allegations that the challenged agency decision was detrimental to him.

Petitioners here have made no showing that the merger approved by the Commission has a significant detrimental effect on them, either actually or potentially. They perceive several possible detrimental effects of the merger: a lessening of competition, the joint ownership of gas and electric properties by Edison, increased rates for former Central customers, increased rates for all customers to offset the allegedly excessive price paid for Central's stock and increased difficulty in demonstrating the need for rate reductions.

Petitioners have shown, in general terms, that the merger will increase Edison's economic power and contribute to economic concentration in the electrical energy industry. They have not shown how such growth and concentration will aggrieve them. In a market characterized by competition a merger or other acquisition necessarily injures the consumer if it substantially lessens competition. In the electric utility industry, where restraints on competition are not only tolerated, but encouraged, see 16 U.S.C.A. § 824a(a), and where rates are subject to federal or state regulation, 16 U.S.C.A. §§ 812, 824d, injury to the consumer cannot be inferred from a merger, but must be demonstrated.

Petitioners have not shown that competition will be lessened by the merger of Edison and Central. The Commission found that Edison and Central were not in direct competition. Their sales to ultimate consumers were within their respective exclusive franchised areas, and Central was not engaged in supplying wholesale electricity. There has been no showing that Central was a potential entrant into the wholesale market. Compare *United States* v. *El Paso Gas Co.*, 376 U.S. 651 (1964). Nor has there been a showing that the enlargement of Edison's economic power as a consequence of the merger may have an anti-competitive effect.

We do not say that the merger of Edison and Central has no adverse effect on competition. We merely hold that petitioners have not shown an anti-competitive injury affecting them.

Edison's ownership of both Central's electric properties and its gas properties may be injurious to energy consumers in the territory formerly served by Central. However petitioners, consumers in Edison's pre-merger territory, are not aggrieved by such joint ownership.

Petitioners have made a showing that the merger may result in higher rates for Central's electric customers. They refer to the Commission's statistical studies of typical electric bills, which show that Edison's typical Chicago and suburban residential bills were higher than Central's typical Rockford residential bill. However, there is no showing that petitioners are aggrieved by higher rates for former Central customers.

Petitioners allege that customers of the merged utilities will be required to pay rates high enough to pay dividends on the "excessive" amount of securities issued in exchange for Central's stock. The merger plan approved by the Commission provides for the automatic conversion of each share of Central common stock into a share of new Edison $1.425 convertible preferred stock, and for Central's redemption of its outstanding preferred stock. Each share of the new Edison stock is convertible at the shareholder's option into six-tenths of a share of Edison common stock and is redeemable at Edison's option after five years at a price of $42.00 per share. The plan pro-

vides that the transaction be accounted for under the "pooling of interest" method, whereby the assets and liabilities of the two utilities are combined in the accounts of the merged company.

Petitioners' argument ignores the controlling Illinois law. Under that law, electric rates established by the Illinois Commerce Commission are based on a fair return on the property used in the public service, *not* on a fair return on the capital invested. *Illinois Bell Telephone Co.* v. *Illinois Commerce Commission*, 414 Ill. 275, 287-288 (1953); *Peoples Gas Light and Coke Co.* v. *Slattery*, 373 Ill. 31, 48-50 (1940).

The Illinois Supreme Court, in *Illinois Bell Telephone Co.* v. *Illinois Commerce Commission, supra*, recognized that a rule basing rates on invested capital would encourage "watered stock":

> "A further criticism would be that the adoption of such a rule would inevitably lead to the sin of over-invested capital, or to a situation susceptible to 'watered stock.' It was for this very reason that the sound, common-sense, and business-judgment rule of a reasonable return on the fair value of the property was evolved in the history of rate making in this country." *Id.* at 288.

Even assuming the unreasonableness of the price paid for Central stock, it does not affect the rates paid by consumers. Under the plan of merger, Edison's rate base and Central's are combined, without change. Petitioners have not shown that Central's valuation of its assets was excessive. On the contrary, they argue that *even with a lower rate structure than Edison, Central's rate of return on its property was higher than Edison's.*

Petitioners' final allegation of aggrievement, that the merger makes more difficult the task of demonstrating the unreasonableness of rates, is insubstantial. The value of plant changes constantly as new plant is acquired and old plant is replaced, depreciated and retired. The addition of Central's electric properties to the Edison plant does not significantly contribute to the inherent complexities of plant evaluation. Nor does the addition

of Central's gas properties create a significant problem of value allocation.

In sum, petitioners have failed to make the requisite threshold showing of aggrievement. They have not made substantial factual allegations of injury to their interests. We recognize the liberalization of requirements for standing to challenge the orders of federal regulatory agencies. *Cf. Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 2 Cir., 354 F. 2d 608, 616 (1965). We hold that petitioners have not met those liberalized requirements.

Since we have found and held that petitioners lack standing to challenge the order of the Commission approving the merger in question, this could be dispositive of the petition for review.

However, assuming arguendo, that petitioners do have standing, after a careful examination of the record, the Commission's decision and order, the briefs and oral argument, we reach the following conclusions.

It is clearly established that in determining the merger was consistent with the public interest, the Commission gave appropriate consideration to the policies of the antitrust laws. The Commission properly recognized that the standards of the Holding Company Act, though not directly applicable, were pertinent and retained jurisdiction of any divestiture issue for later determination. The Commission accounting treatment for the merger reasonably protected the public against any possible financial abuses from the merger.

Petitioners did not appear at the hearings and, with indulgence of the Commission, submitted written interrogatories and filed objections. We must conclude that the petition for review lacks substantial support and is wholly without merit. We do not deem it necessary to further state our views in this respect.

In short, the Commission decided this case on a comprehensive record, its findings were reasonable and consistent with the application of correct legal criteria, the public interest has been faithfully protected and the order should be affirmed.

We have carefully considered the motion of petitioners for remand for further hearings and a stay order. Such motion is denied.

For the foregoing reasons, the petition for review is denied and the Commission's orders approving the merger and denying rehearing are in all respects affirmed.

PETITION FOR REVIEW DENIED

ORDERS AFFIRMED.

No. 16164.

SWYGERT, *Circuit Judge*, concurring.

I am convinced that we are reaching the right result in this case by affirming the order of the Federal Power Commission approving the merger of Central Illinois Electric and Gas Company into Commonwealth Edison Company. I question, however, the majority's holding that the petitioners lack standing in this court to challenge the order of the Commission. Simply because the petitioners' claims of aggrievement are found, upon analysis, to be insufficient to set aside the merger does not, in my opinion, foreclose their standing to challenge the Commission's order. The question of their standing ought not to be merged with the question of the merit or lack of merit of their claims.

Regardless of any specific claims of aggrievement alleged by the petitioners, I believe that as consumers of Edison they have standing to pursue their petition for review. They were allowed to intervene in the proceeding before the Commission, and they participated in the hearings to a limited extent. In allowing intervention, the Commission indicated that such allowance was not to be construed as a "recognition" that the petitioners might be "aggrieved" by any order or orders subsequently issued by the Commission.[1] On the other hand, the Commission in this court makes no mention of the issue of petitioners' standing. (Only Commonwealth

[1] 16 U.S.C. § 825g(a) recognizes the Commission's power to "admit as a party [in any proceeding before the Commission] . . . any representative of interested consumers or security holders, . . ."

Edison raises this issue.[2]) I recognize that these facts are not determinative of the question of standing. For the right or allowance of intervention by a party in an administrative proceeding is not necessarily tantamount to a right of that party to judicial review as one who is "aggrieved" by the agency action.[3] But these circumstances are not without significance; indeed, they lend strength to the stature of petitioners as "parties aggrieved" by the Commission's order.

The landmark case, *FCC* v. *Sanders Bros. Radio Station,* 309 U.S. 470 (1940), initiated a trend which has most recently found expression in *Scenic Hudson Preservation Conference* v. *FPC,* 354 F.2d 608 (2d Cir. 1965), to broaden the class of parties that have standing to challenge agency action in court.[4] I respectfully submit that the majority in the instant case has veered sharply from that trend. Here, representatives of neither local governing bodies nor other affected groups attempted to obtain a review of the Commission's approval of the merger. In these circumstances, I believe that private parties, such as these petitioners who are consumers of one of the merged companies, ought to have standing to protect the public interest as "private Attorney Generals." *Cf. Associated Indus., Inc.* v. *Ickes,* 134 F.2d 694, 704 (2d Cir.), *vacated as moot,* 320 U.S. 707 (1943). Other-

[2] After the Commission's order approving the merger was entered, the petitioners (intervenors) filed a petition for rehearing with the Commission. Under 16 U.S.C. § 825l(a), the right to petition the Commission for a rehearing is limited to, "Any person, . . aggrieved by an order issued by the Commission. . . ." Thus the same statutory standard governs the right both to petition the Commission for a rehearing and to petition an appellate court to review Commission action. Although the Commission denied the petition for rehearing, it in no way intimated that the petitioners (intervenors) failed to satisfy the test of aggrievement necessary to seek a rehearing. Likewise, Edison did not question the petitioners' (intervenors') right to file the rehearing petition. The Commission's action in this regard dilutes the effect of its disclaimer that the petitioners (intervenors) would not be viewed to be aggrieved merely because they were allowed to intervene. Moreover, I have difficulty reconciling Edison's apparent silence at the time the petitioners (intervenors) sought a rehearing with its attack on their standing in this court.

[3] *Cf.* Jaffe, *Standing to Secure Judicial Review: Private Actions,* 75 HARV. L. REV. 255, 275 n. 67 (1961); Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators,* 81 HARV. L. REV. 721, 753 n. 139 (1968).

[4] *See* Jaffe, *supra* note 3.

wise, agency action of significant import might improvidently be foreclosed from the judicial oversight necessary to insure that the proper statutory safeguards and procedures have been followed. Consequently, I would hold that the petitioners have standing as "parties aggrieved," under 16 U.S.C. § 825*l*(b) to challenge the Commissioner's order in this court.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

USCA 3616—The Scheffer Press, Inc., Chicago, Illinois—4-5-68—425